STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN RESTAURANT AND TAVERN BROKERS, INC., and WADE MONTRIEF,

Plaintiffs-Appellants,

v

RUDY EVANS and SPOWAN, INC., d/b/a HARDEE'S,

Defendants-Appellees.

UNPUBLISHED
September 5, 2000

No. 213164
Oakland Circuit Court
LC No. 97-537969-CK

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

In this breach of contract case, plaintiffs appeal as of right from an order granting summary disposition under MCR 2.116(C)(10) to defendants. We reverse and remand.

Defendants Evans and Spowan, Inc., are the owners of a Hardee's restaurant franchise. Plaintiff Michigan Restaurant and Tavern Brokers, Inc. (hereinafter "MRTB") is a real estate broker, and plaintiff Montrief is MRTB's principal broker. On March 15, 1995, plaintiffs and defendants entered into an exclusive, nine-month licensing agreement for the sale of the franchise. The agreement called for defendants to pay MRTB a ten percent commission upon the occurrenceof certain specified conditions.[1] In October 1995, plaintiff found two potential buyers, Saleem Siddiqi and Srinivas

[1] Those conditions, set forth in ¶ 4 of the listing agreement, are as follows:

> To pay said broker a 10% professional service fee, for which real estate and/or business are sold, including inventory of merchandise, fixtures, and equipment, (a.) if broker or a salesperson representing broker find a buyer during said period ready, willing and able to consummate a sale on the above named terms, or (b.) if said property is sold or exchanged during said term, or (c.) if said property is sold or exchanged or optioned within TWO YEARS thereafter to any person, organization, corporation, their officers, agents or members, resulting through or from contacts,

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Nannapaneni. After a series of offers and counteroffers, an agreement was reached for Messrs. Siddiqi and Nannapaneni to purchase the franchise, the land, and the building for $950,000. However, the deal was never consummated because the franchisor exercised its right of first refusal under the licensing agreement it had with defendants. For reasons that are not clear, despite exercising its right of first refusal, the sale of the business to the franchisor was never completed.

Thereafter, plaintiffs brought suit for the commission they claimed was due them under the terms of the listing agreement. Plaintiffs argued that they were not informed by defendants of the franchisor's right of first refusal until after the agreement was reached with Siddiqi and Nannapaneni. The trial court granted defendants' motion for summary disposition, concluding that "[p]laintiffs have failed to establish that the [listing] agreement did not provide notice of [the franchisor's] right of first refusal." The court based this conclusion on the following handwritten addition inserted at the end of the first paragraph of the licensing agreement: "CONTINGENT ON APPROVAL OF FRANCHISOR. WILL GIVE RIGHT OF FIRST REFUSAL ON PURCHASE OF THE BUILDING" (capitalization in original). The court reasoned, "[Montrief's] deposition testimony that he was unaware of any right of first refusal is not permitted to vary or contradict the terms of a complete written agreement."

Plaintiffs argue the trial court erred in granting summary disposition to defendants. We agree. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiffs assert that contrary to the conclusion reached by the trial court, the listing agreement did not include language indicating that the franchisor had a right of first refusal. Plaintiffs do not dispute that the language cited as dispositive by the trial court is included in the listing agreement. However,

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> showings, efforts or oral or written negotiations made by said broker or salespersons licensed with said broker, during the term hereof, or (d.) should the owner withdraw this listing prior to the term provided herein, or (e.) should the owner lease the property or business, or otherwise encumber it so as to prevent or jeopardize the availability or salability thereof, or (f.) should the owner, or shareholders of the owner, relinquish all or part of their right to possession or control of said property by any sale or exchange of stock.

they contend that the passage does not indicate, and thereby inform, that the franchisor had the right of first refusal. Accordingly, plaintiffs also argue that because they found buyers who were "ready, willing and able to consummate the sale," they should have been paid their ten percent commission.

At the heart of this appeal is whether the language inserted at the end of the listing agreement's first paragraph clearly states that the franchisor had the right of first refusal. We find this language to be ambiguous. See *Farm Bureau Insurance v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). In order to determine the intent of the parties, courts must look at the words used in the contract itself. *Id.* "If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

The first sentence of the additional language—"CONTINGENT ON APPROVAL OF FRANCHISOR"—does not specifically include or exclude a franchisor's right of first refusal. To conclude that this sentence refers to such a right, the assumption has to be made that the parties to the contract understood that the exercise of the right of first refusal was one of the methods by which the franchisor could disapprove the sale. This premise is not spelled out anywhere in the listing agreement. While there is an affidavit by Siddiqi in the record that states that he had such an understanding, this does not clarify whether plaintiffs also had such knowledge.

We find the second sentence—"WILL GIVE RIGHT OF FIRST REFUSAL ON PURCHASE OF BUILDING"—to be similarly unclear. We do not believe one can tell by the language alone whether it refers to, and is an explanation of, the franchisor's right of first refusal, or, for example, to an extension of such a right regarding the building to any prospective purchasers. Accordingly, we conclude the trial court erred in granting summary disposition to defendants.

Further, because a question of fact exists on the issue of plaintiffs' knowledge of the franchisor's right of first refusal, examination of whether plaintiffs are entitled to the ten percent commission is premature.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins